

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

SIERRA VERDE PLUMBING LLC

and

Case 28-CA-209991

ERNEST RODRIGUEZ, An Individual

Judith E. Dávila, Esq.,

for the General Counsel.

Denise Greathouse, Esq. (Michael Best & Friedrich LLP),

for the Respondent Company.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. In early September 2017, Sierra Verde Plumbing, a residential plumbing company in Phoenix, Arizona, discharged one of its plumbers, Ernest Rodriguez, assertedly because of problems with his work performance. Rodriguez subsequently filed an unfair labor practice charge, and the NLRB Regional Director thereafter issued a complaint alleging that he was actually terminated because he concertedly complained about wages, hours, and working conditions (access to necessary materials and equipment, the need to work overtime to complete assigned work, and the payment of employees on a piecework basis), and because he threatened to contact the Labor Board. The complaint alleges that the termination therefore violated both Section 8(a)(1) and Section 8(a)(4) of the National Labor Relations Act.¹

The hearing was held on September 25–26, 2018, and the General Counsel and the Company thereafter filed briefs on October 31. As discussed below, the credible evidence fails to support the allegations.² Accordingly, the complaint is dismissed.

¹ Rodriguez filed the initial charge on September 12 (GC Exh. 7). However, the charge failed to identify the Company's correct name. So, he filed a new charge with the correct name on November 16 (GC Exh. 1(a)). The Regional Director subsequently issued the complaint on February 9, 2018 (GC Exh. 1(c)).

² Citations to the record are included to aid review and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp.*, 335 NLRB 622, 633 (2001), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), *cert. denied* 522 U.S. 948 (1997).

I. FACTUAL BACKGROUND

Rodriguez was hired by Sierra Verde in May 2017. He had about 18 years of plumbing experience at the time and was hired by the Company to be a so-called “pickup” plumber, i.e., a plumber that fixes, repairs, or completes other plumbers’ work, on one of the crews. Like the Company’s four or five pickup plumbers on the other crews, Rodriguez was paid by the hour. However, the Company also employed numerous other plumbers, some of whom were paid by the job (“piecework”).

Rodriguez was initially supervised by a crew superintendent named Julio. However, a month or two later, in June or July, Julio was replaced in that position by Robert Torres. Torres had been a plumber for over 12 years and had worked as a pickup plumber for another company before being hired by Sierra Verde. However, he had never been a superintendent before.

Over the 4 months Rodriguez was employed by the Company, both Julio and Torres complained to managers about his work performance. Their primary complaint was that Rodriguez repeatedly failed to finish his assigned work or to communicate accurate information about whether he had done so. Julio complained about this to Ralph Cozzolino, the managing partner/co-owner. And Torres complained about it to Mark Millan, the Company’s operations manager at the time, based either on his own personal knowledge or on reports he received from a client building supervisor. Torres also complained to Millan that Rodriguez was insubordinate, failed to follow his instructions, and would abruptly hang up on him during their phone conversations.³

Millan likewise talked to Cozzolino about the problems with Rodriguez. Millan told Cozzolino both about the complaints he received from Torres and about similar problems he also personally experienced with Rodriguez or heard about from a client building supervisor.⁴

All three—Torres, Millan, and Cozzolino—also spoke with Rodriguez himself at various times about the problems, both on the phone and in person.⁵ Rodriguez always denied any fault or responsibility when they did so. He insisted that he had, in fact, finished his work, said he didn’t have the parts or tools to finish it, or blamed Torres or Millan for giving him the wrong instructions or material, not putting the work on his schedule, or assigning him too much work to

³ Tr. 50–51, 62–63, 85, 111, 117, 212, 237–238, 285–286. Cozzolino testified that Torres also spoke to him about these problems (Tr. 50–52). However, Torres testified that he did not recall speaking with Cozzolino (Tr. 269).

⁴ Tr. 50, 52, 64, 82–84, 277–278.

⁵ Rodriguez admitted that Cozzolino spoke to him about Julio’s complaint (Tr. 212). He also admitted that Torres asked him why he had hung up during a phone call (Tr. 216–217). Although he denied that either Torres or Millan ever spoke to him about his work performance (Tr. 181–183, 211), the credible evidence establishes otherwise. See Tr. 52, 68, 79–80, 95, 116, 282–284; and GC Exh. 5.

finish in his regular 8-hour workday without authorized overtime. As for the hang-ups, Rodriguez said that the phone calls were dropped because of poor reception.⁶

Sometimes Rodriguez’s explanations or excuses would check out. But, mostly they did not, at least not to the satisfaction of Torres and Millan. And there were no similar problems with or complaints about the pickup plumbers on the other crews.⁷

In any event, the perceived problems with Rodriguez continued.⁸ Indeed, on August 31, Torres became so frustrated that he wrote and sent Rodriguez the following text messages:

Why is 114 Kensington still leaking??? U have to follow through and finish the job, ur the last one to look at it. If u don't have the part u need to go back the next day or two to complete it.

This is why I tell u, what I didn't get finish u have to go back and complete.
. . . .

What u don't do on ur schedule on that day needs to be finished the next day. I shouldn't have to put it on the schedule again you should know what hasn't been done. Ur doing the work.⁹

Torres also again complained about Rodriguez when Millan subsequently asked how he was doing. Torres told Millan that Rodriguez “still has an attitude, I don’t know why. He’s still not finishing his, whatever I give him throughout the whole day. I go behind him, and I’m fixing them.” In short, Torres said, “I don’t need him.”¹⁰

In the past, Millan had told Torres to try to work with Rodriguez, to get him on his side and make him feel part of the team. But, after speaking with Torres following the August 31 incident, Millan consulted Cozzolino and the two of them decided to terminate Rodriguez.¹¹

⁶ See Tr. 79, 95–96, 109–111, 145, 157–160, 198–199, 205–207, 216–217, 242; and GC Exh. 5. Rodriguez was not permitted to work overtime unless authorized by Millan or Cozzolino (Tr. 98–99, 193, 204–205, 212).

⁷ Tr. 52, 79, 86–87, 233, 241–242, 282–285.

⁸ Tr. 82, 105–108.

⁹ GC Exh. 5, pp. 66–69.

¹⁰ Tr. 99–100.

¹¹ Tr. 48, 53, 63–64, 111, 278–279, 285–286. The exact date Torres spoke with Millan is unclear. Torres testified that he could not remember (Tr. 100), and Millan was never asked about the date. As for the date the termination decision was made, Millan’s September 21, 2017 email summary to the Human Resources (HR) officer states that the decision was made on September 5 (GC Exh. 3). However, Millan testified at the hearing that the decision was made the morning of Rodriguez’s termination (Tr. 278), which was September 7 (GC Exh. 5).

Millan and an HR officer met with Rodriguez and informed him of the decision on September 7, after Rodriguez clocked out for the day. When Rodriguez asked why he was being terminated, Millan said it was because he wasn't finishing his work, was insubordinate, and had an attitude.

Rodriguez had little respect for Millan because he thought Millan was just a "framer guy" who did not really know plumbing. He told Millan that the reasons cited for his termination were "bullshit"; that he had been doing his job right and that Torres had told him a couple times that they were doing good and getting caught up with the workload.¹²

Millan then requested Rodriguez to return the keys to the company truck, but Rodriguez refused, saying he needed to get some personal stuff from it. So, Millan followed Rodriguez outside to the truck. After retrieving his personal items, Rodriguez briefly returned to the front office (apparently to ask for his final paycheck). He then left the building and began walking to his personal vehicle across the street. Millan continued to follow him as he was still carrying the keys to the truck. Eventually, however, as they were crossing the street, Rodriguez turned and threw the keys back onto the property in the direction of the building.

Nevertheless, Millan continued to follow Rodriguez, intending to look inside his vehicle to make sure there was no company property in it. This further irritated Rodriguez, who thought Millan was trying to provoke him. When he reached his vehicle, Rodriguez turned back around, pointed his finger in Millan's face, and said, "You know what, you're a joke. I give this company 3 years underneath you because you really don't know nothing. You're firing a good plumber for nothing." Rodriguez then added, "You don't know who you're dealing with, I'm going to take this to the Labor Board. I am going to own this company. I'll be working back here, [and] you're going to be fired."¹³

¹² Tr. 69, 73, 166–167.

¹³ See Millan's testimony (Tr. 69, 73–78, 167–169, 187–188), and Rodriguez's testimony (Tr. 279, 281). To the extent their testimony conflicts with or is inconsistent with the above findings, it is not credited. For example, Rodriguez denied that he cussed, threw the truck keys, or was upset or mad at Millan. He testified that he was calm and collected throughout because he had previously filed charges against other companies, he knew that his rights were being violated, and he intended to talk with the Labor Board about it. (Tr. 187–189, 308). However, he admitted that he thought Millan was "trying to make him mad or something"; that he pointed his finger in Millan's face; and that he called Millan a "joke." Further, he was no stranger to the word "shit." See his prior work-related text messages to Torres, GC Exh. 5, p. 15 ("Sad when a super has to be shown how to do shit"), and GC Exh. 6, pp. 6 ("Who did this is shit").

As for Millan, he testified that Rodriguez also called him a "fucking punk-ass pussy" and threatened to "kick [his] ass" when they were in the hallway, and that Rodriguez actually touched or poked him in the nose with his finger when they were across the street by Rodriguez's vehicle (Tr. 75–77, 280). Indeed, Millan testified that he considered pressing charges against Rodriguez because of this additional conduct. He testified that "we" even checked the security camera footage, but that Rodriguez's vehicle was outside the camera's range (Tr. 289). As indicated above Millan no longer worked for the Company at the time of the hearing, and he presented as a credible witness generally. However, the Company failed to

Shortly thereafter, Rodriguez also texted an angry message to Torres saying, “You’re something else you tell me we’re catching up [and] doing good the[n] tuck tail when super sends emails about you [and] you throw me under the bus buster.”¹⁴

- 5 Millan was laid off by Sierra Verde the following month, in October 2017. Torres left the Company about 8 months later, in June 2018.¹⁵

II. ANALYSIS

- 10 As indicated above, the complaint alleges that Sierra Verde terminated Rodriguez for two unlawful reasons: (1) because Rodriguez “concertedly complained to [the Company] . . . by raising concerns with other employees and [the Company] about wages, hours, and working conditions, including access to necessary materials and equipment, the need to work overtime to complete assigned work, and the payment of employees on a piecework basis” (the alleged
15 Section 8(a)(1) violation); and (2) because the Company “believed that Rodriguez intended to contact or consult with the Board or file a charge with the Board” (the alleged Section 8(a)(4) violation).

- 20 As discussed in the factual summary above, however, Rodriguez only raised the lack of necessary materials or tools or the need to work overtime to finish work on an ad hoc, individualized basis as an explanation or excuse when he reported or responded to accusations that he failed to complete a particular job. There is no evidence that he ever sought to initiate, induce, or prepare for action by the pickup or other plumbers as a group regarding such matters

present any other testimonial or documentary evidence, direct or circumstantial, corroborating this particular testimony. For example, the Company never called the HR officer or anyone else to confirm what Rodriguez said to Millan in the hallway. Nor did the Company establish through Millan or other evidence that there were no other witnesses to it. See *Double D Construction Group, Inc.*, 242 NLRB 910, 913 (2004) (“Along with other evidence, an adequate foundation includes testimony concerning who else, besides the witness, was present.”). Further, the Company never asked the three witnesses it did call to testify (Torres and co-owners Cozzolino and Armando Encinas) whether Millan told them at the time about Rodriguez’s additional conduct in the hallway and outside or whether they, Millan, or anyone else subsequently checked the security camera footage. Accordingly, the Company failed to adequately establish that the additional conduct occurred.

¹⁴ GC Exh. 5, p. 91. See also Rodriguez’s testimony, Tr. 186 (admitting that he was angry with Torres when he wrote the text message).

¹⁵ Tr. 57, 89–90, 92, 119, 266. Rodriguez testified that Millan and Torres were both “fired” by Sierra Verde (Tr. 308–309). However, no foundation (personal knowledge) was established for this testimony. In any event, there is no dispute that neither was still employed by the Company at the time of the hearing.

or to bring any such group complaints regarding such matters to the attention of management.¹⁶ See *Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 263 (D.C. Cir. 1993) (“Concerted activities include actions of individual employees which “seek to initiate or to induce or to prepare for group action” and actions which “bring truly group complaints to the attention of management.”), quoting *Meyers Industries, Inc.*, 281 NLRB 882, 887 (1986), *affd.* sub nom. *Prill v. NLRB*, 835 F.2d 1481, 1484 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988). See also *Plumbers Local 412*, 328 NLRB 1079, 1083–1084 (1999); and *Hospital of St. Raphael*, 273 NLRB 46, 47–48 (1984) (finding no protected concerted activity under similar or analogous circumstances).

The General Counsel’s posthearing brief fails to address these factual and legal deficiencies with the 8(a)(1) termination allegation. Indeed, the General Counsel’s posthearing brief does not address the allegation at all. Although the “Introduction” section of the brief (p. 4) summarily asserts that Sierra Verde fired Rodriguez because of his protected concerted activity, the subsequent “Argument” and “Conclusion” sections do not further discuss or request a finding regarding that allegation.¹⁷ Thus, the General Counsel appears to have abandoned it. In any event, the General Counsel failed to prove the allegation for the reasons stated above.¹⁸

There is likewise no substantial evidence supporting the 8(a)(4) termination allegation, i.e., that Sierra Verde terminated Rodriguez because he had threatened to go to the Labor Board. As discussed above, the credible evidence is that Rodriguez told Millan *after* he was terminated that he was going to talk to the Labor Board.

In contending otherwise, the General Counsel cites Rodriguez’s testimony about an earlier conversation he had with Torres on September 7. Rodriguez testified that Torres “popped into” the first house he was working at that morning and “out of nowhere” said he “thought I was a cool guy,” and wanted to “give me a heads up” that Millan “had mentioned to him that I was going to be changed from hourly to piecework.” Rodriguez told Torres “that wasn’t right”; that he had been started as an hourly person and that he was “going to talk to the Labor Board about that” because it was his “understanding that Arizona wasn’t a piece-working state.” Torres said, “Cool, whatever. I was just trying to give you a heads up because I thought you were a cool guy.” They then joked around a little bit and went back to work. (Tr. 164–165.)

¹⁶ Rodriguez testified on direct examination that, while loading up one morning, he told a two-man, father and son, top-out crew that he couldn’t get his jobs finished the previous day because he didn’t have the right materials, and that they told him the same thing had happened to them (Tr. 159). However, Rodriguez subsequently admitted on cross-examination that he “really didn’t know anybody else” and “never got to talk” to any other pickup plumbers “about how their work went” during his brief employment with the Company (Tr. 183). As for the payment of employees on a piecework basis, as discussed *infra*, there is no credible evidence that the issue ever came up or that Rodriguez ever raised such concerns.

¹⁷ The “Conclusion” section of the brief (p. 29) requests only a finding that Sierra Verde “discharged Rodriguez for engaging in protected activity by threatening to contact the Labor Board.”

¹⁸ See generally *Signature Flight Support*, 333 NLRB 1250 (2001), *affd.* mem. 31 Fed. Appx. 931 (11th Cir. 2002) (discussing the elements required to prove an 8(a)(1) retaliation violation).

However, there are several problems with this testimony. First, Torres denied that he ever had such a conversation with Rodriguez (Tr. 234–235). As indicated above Torres no longer worked for the Company at the time of the hearing, he had no personal interest in the outcome, and he otherwise presented as a credible witness.¹⁹ Second, Cozzolino and Millan both denied that there was ever any discussion of changing Rodriguez to piecework, or that they were ever told that Rodriguez had threatened to go to the Labor Board, prior to his termination (Tr. 54, 78, 276–277, 294 –295). Third, there is no dispute that neither Millan nor Rodriguez ever mentioned the piecework issue or the earlier conversation with Torres about it during or after the termination meeting (Tr. 277). Fourth, as noted above (fns.13 and 16), Rodriguez presented inconsistent testimony about other significant matters. Thus, there is good reason to doubt his testimony about this significant matter. Accordingly, the General Counsel failed to prove the 8(a)(4) termination allegation as well.²⁰

Finally, the Company also argues that Rodriguez lost the protection of the Act because of his postdischarge conduct.²¹ However, as noted above (fn.13), the Company failed to adequately establish that the most offensive postdischarge conduct it relies on occurred. In any event, it is unnecessary to address the Company’s additional argument given the findings and conclusions above that the General Counsel failed to establish by a preponderance of the credible evidence that the discharge itself violated the Act.

ORDER²²

The complaint is dismissed.

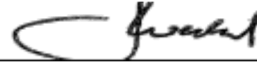
¹⁹ See fn. 2, supra. See also *Alexandria NE LLC*, 342 NLRB 217, 219 (2004); *James H. Boyle & Son, Inc.*, 237 NLRB 135, 136 n. 5 (1978); and *Indio Community Hospital*, 225 NLRB 129, 131 (1976). To paraphrase *Indio*, it is possible that Torres, who was unemployed at the time of the hearing, will want a job reference from Sierra Verde at some point, but he impressed me on the stand as a witness who was not personally affected by the outcome of the case and who was trying to relate the facts as accurately as he could.

²⁰ See generally *Newcor, Inc.*, 351 NLRB 1034 n. 4 (2007) (discussing the elements required to establish an 8(a)(4) retaliation violation). The complaint also alleges that Millan’s statement to Rodriguez that he was being terminated partly because of his “attitude” was a reference to Rodriguez’s prior threat to go to the Labor Board during his conversation with Torres, and therefore independently violated Section 8(a)(1) of the Act. For essentially the same reason stated above (the General Counsel failed to establish that the prior threat to go to the Labor Board ever happened), this additional allegation likewise fails.

²¹ See *Stephens Media, LLC*, 356 NLRB 661 (2011) (discussing the proper standard to be applied in evaluating whether an unlawfully discharged employee should be denied reinstatement and backpay because of his/her postdischarge conduct in reaction to the unlawful discharge), enfd. 677 F.3d 1241 (D.C. Cir. 2012).

²² If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Dated, Washington, D.C., November 14, 2018

A handwritten signature in dark ink, appearing to read 'Wedekind', is written over a horizontal line.

Jeffrey D. Wedekind
Administrative Law Judge